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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of MELISSA LEA and
RANDALL DARREN THOMAS.

MELISSA LEA THOMAS,

Respondent,

v.

RANDALL DARREN THOMAS,

Appellant.

F056387

(Super. Ct. No. 04-212186)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Commissioner.

Joan A. Watters for Appellant.

Kathleen Bakergumprecht-Davies and Julie A. Hicks for Respondent.

-ooOoo-

Appellant Randall Darren Thomas appeals the trial court's order on child support, contending the trial court erred when it considered the income of his current spouse in determining child support. We agree and will reverse.

FACTUAL AND PROCEDURAL SUMMARY

The marriage of Randall and Melissa Lea Thomas¹ was dissolved on December 23, 2005. A marital settlement agreement attached to the judgment provided that the parties would have joint legal custody of their minor daughter, Kendall, and that Randall would have visitation with the child several days per month, for four hours per day. The agreement also specified that Randall would pay \$1,772 per month to Melissa as child support for Kendall.

Melissa was ordered to use her best efforts to obtain employment. Although Randall was ordered to pay spousal support of \$2,200 per month, there was a fixed termination date on spousal support.

On January 18, 2008, an order was filed that referenced a “corrected” record regarding the child support findings, apparently setting child support at \$1,996 per month, payable by Randall to Melissa.

On July 31, 2008, acting in propria persona, Randall filed a request for modification of visitation and child support. Randall asked to increase his visitation and physical custody time so that it was equal with Melissa’s and to reduce his child support obligation. Randall had remarried in June 2006 and had a child with his new wife, Amanda. Randall wanted his two children to spend more time together as siblings. Randall also wanted an adjustment in visitation because Kendall was starting preschool and that would disrupt the existing visitation schedule.

At the time the initial child support and custody order was entered, Randall was commuting to Riverside, California, for his job with Falken Tire Corporation (Falken). According to Randall’s accompanying declaration, after the order was entered, Randall sought and received accommodations from Falken to work part time out of Visalia, which

¹We will refer to Randall and Melissa by their first names, not out of disrespect but to avoid any confusion to the reader.

would allow him to exercise his visitation with Kendall. Subsequently, however, Falken made a demand for Randall to return to work full time in Riverside, which Randall could not do without forfeiting his visitation time. Alternatively, Falken offered to allow him to continue working part time out of Visalia, but at 60 percent of his former salary, which Randall accepted. In July 2008, Falken terminated Randall's employment stating his "services are no longer needed."

Because he was terminated by Falken, Randall accepted a position with his in-laws' construction business, Franzen-Hill Corporation (Franzen-Hill). Randall did not have the necessary licenses for the construction business, but was working in sales and marketing. Amanda was vice-president of operations. His income from Franzen-Hill of \$4,200 per month was significantly less than the base salary of \$10,900 per month he had earned at Falken. Randall also pointed out that Melissa was now working full time for a school district at a salary of \$41,423 per year.

In support of his request for modification, Randall attached letters from Falken, current payroll information from Franzen-Hill, and a new income and expense declaration.

Melissa opposed any change in visitation or child support and asked that the existing orders remain in effect. In her opposition, Melissa contended that Randall filed his motion only after she refused to agree to a downward adjustment in child support to \$500 and to allow Randall more visitation. She also asserted that Randall's change in income was motivated by a desire to avoid paying child support.

Randall responded with another declaration, pointing out that the mediator agreed it was in Kendall's best interest to spend equal time with each parent. Randall also noted that he could not continue to work for Falken unless he moved to Riverside, which would preclude many scheduled visits with Kendall, who was in Visalia. Additionally, Randall noted that there had not been any adjustment to the child support after Melissa was ordered to seek full-time employment, which she had obtained.

At the hearing on Randall's request, the trial court noted, "the issue is going to be whether I should attribute to you your ability to earn what you were earning four months ago, before you made a decision to change jobs." The trial court went on to note, however, that its "charge is to make a determination of what your ability to earn is."

Randall responded that he had continued to work as long as he could for Falken but did not want to move to Southern California and miss his visitation with Kendall. He took the job at Franzen-Hill as his job at Falken was ending. Randall acknowledged that his income had gone down, while Amanda's had gone up. Randall stated Amanda's income had gone up because her parents were easing into retirement. They promoted Amanda and a pay increase accompanied the increased responsibilities.

The trial court replied that although Randall's income had decreased, "your household income is the same." Additionally, the trial court noted that "absent extraordinary circumstances," the court could not "add it onto your income." The trial court went on to state that although it could not include Amanda's income in setting child support, it had to include her income in establishing the true tax obligation, which would reduce the child support obligation. The trial court referenced one of its prior decisions, where it concluded such a result was not "equitable or fair," but the decision had been reversed on appeal. The trial court also noted its discomfort with Franzen-Hill being a closely held corporation and Randall's in-laws "have a considerable amount of control over how that income is divided and distributed."

Randall agreed that his pay at Franzen-Hill did not reflect his earning capacity at a job similar to his former position, but he stated he had searched numerous alternatives in Tulare, Fresno, San Jose, and other locations that would require travel of no more than one week per month. He was unable to locate any work comparable in pay to Falken. Randall also acknowledged that his "earning potential in Tulare County" was greater than his pay from Franzen-Hill.

Randall agreed that he should have attributed to him income that reflected his earning capacity in Tulare County at a job commensurate with his skills, degree, and experience. Randall stated he had been unable to find a job like that in Tulare County or other close locations, which is why he took the Franzen-Hill job. Randall also offered to give the trial court the 10-year financials for Franzen-Hill so the trial court could assess his earning potential at that company. Additionally, Randall pointed out that Amanda's income had increased as his in-laws had promoted her from manager to vice-president and had begun turning over more authority to Amanda as the only heir to the business.

Melissa conceded at the hearing that there had to be a \$100 to \$200 adjustment downward in child support because of her increased earnings. Melissa also argued that Randall's family income was the same or higher as when he worked for Falken, and that the family income had to be considered in setting child support.

The trial court concluded by stating it had two options: (1) calculate child support based upon Melissa's increased earnings and Randall's decreased earnings, or (2) calculate child support based upon Randall's family income as Melissa suggested. The trial court stated it "can't cut it in the middle." The trial court also told Randall that he had a third option open to him, which was to make a compromise offer to Melissa. The trial court took the matter under submission.

The trial court issued a written decision on the child support and visitation modification sought by Randall. The trial court found "no evidence [of] bad faith on the part of Randall to support a finding that he left his employment with Falken Tire in an attempt to reduce his child support obligation to Melissa." The trial court also found there was no evidence that Randall had been terminated for malfeasance. The trial court found the evidence supported a finding that Randall changed employers so he could be closer to Kendall and exercise his visitation rights.

The trial court specifically refused to attribute "to Randall an ability to earn commensurate with what he was paid by Falken Tire before his termination in July of this

year.” The trial court noted that Randall had been forced to choose “between a much better paying job and being a father, regularly and meaningfully participating in his daughter’s life. No father, or mother, should have to make that trade.”

The trial court went on to state that the presumed guideline child support would be reduced to \$68 per month, after Amanda’s income was considered for purposes of determining the state and federal income tax liability, and that Randall’s after-tax-adjusted net income would be less than Melissa’s under this calculation. Finding that this would result in an “inequity as well as an injustice to Kendall,” the trial court stated it was deviating from the guidelines.

The trial court concluded that Randall had an obligation to support Kendall “according to his circumstances and station in life.” The trial court went on to state that Franzen-Hill was a closely held family business in which “Randall and his new wife have considerable leeway in determining the combined [income] level of their household” and therefore the trial court was factoring in Amanda’s income in deviating from the guidelines because “Not to do so would result in extreme hardship to Kendall.” The trial court set child support at \$1,996 per month and increased Randall’s visitation time with his daughter. Randall also was ordered to pay \$1,000 toward Melissa’s attorney fees.

DISCUSSION

Standard of Review

Child support awards are reviewed for abuse of discretion. (*In re Marriage of Wood* (1995) 37 Cal.App.4th 1059, 1066 (*Wood*).) Determination of a child support obligation, however, is a highly regulated area of the law. The trial court’s discretion is not so broad that it may ignore the law. The only discretion provided a trial court with respect to child support awards is that set forth by statute or rule. (*County of Stanislaus v. Gibbs* (1997) 59 Cal.App.4th 1417, 1425.)

Family Code Section 4057.5²

The Legislature adopted the Agnos Child Support Standards Act of 1984, codified at former Civil Code section 4720 et seq. (now Fam. Code, § 4050 et seq.). In doing so, the Legislature intended to establish a system of standards and procedures providing for a uniform determination of child support awards throughout the state. (*In re Marriage of Rine* (1993) 18 Cal.App.4th 953, 958.) “Under the Agnos Act, the court must employ a formula to determine the appropriate amount of child support.” (*Ibid.*) Section 4055 sets forth this formula. One of its essential components is the “net monthly disposable income” of each parent. (*Id.*, subd. (b)(1)(C).)

Before January 1, 1994, trial courts had the authority to consider a new spouse’s income in a child support action. (*Wood, supra*, 37 Cal.App.4th at p. 1066.) This no longer is true. Section 4057.5, enacted in 1993, now explicitly provides that any income generated by a parent’s subsequent spouse or nonmarital partner is not to be considered when determining or modifying child support, except in an extraordinary case when excluding that income would lead to extreme and severe hardship to any child subject to the child support award. In such a case, the trial court is also to consider whether including this income will lead any child supported by the parent or subsequent spouse to suffer extreme and severe hardship.

Section 4057.5 was enacted to “address concerns of subsequent spouses who were, by virtue of marriage, forced to support their spouse’s children and ex-spouse.” (*County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 854 (*Campbell*).) Section 4057.5 prohibits “direct consideration of a new spouse’s income in determining proper support, absent extraordinary circumstances.” (*Campbell*, at p. 854.) Section 4057.5 permits a trial court to consider a new spouse’s income in an “extraordinary case where excluding [the new spouse’s] income would lead to extreme and severe hardship to any child.”

²All further statutory references to the Family Code unless otherwise specified.

(§ 4057.5, subd. (a)(1).) Here, the trial court considered the new spouse's income in calculating child support.

We note first that the trial court accepted evidence of the new spouse's income before establishing that there were extraordinary circumstances that would lead to extreme and severe hardship for Kendall unless Amanda's income was considered. Until there is a determination that the income of the parents is insufficient to prohibit "extreme and severe hardship to [the] child," a new spouse's income is not to be considered.

(§ 4057.5, subd. (a)(1).) The exception to utilization of a new spouse's income depends entirely on the needs of the child, and those needs must be established by competent evidence. (*Wood, supra*, 37 Cal.App.4th at p. 1067.)

The trial court's ruling stated that Kendall would suffer "extreme hardship" unless Amanda's income was included in the child support calculations. No factual findings were made by the trial court to support this conclusion. Furthermore, we can find no evidence in the record that addressed Kendall's needs or how and why the combined income of both of Kendall's parents, which exceeds \$91,000 per year, would be insufficient to satisfy Kendall's needs. This seems particularly true when Melissa's income and expense information disclosed that she had managed to accumulate cash deposits of \$45,000 during the time she had been receiving child support. We cannot conclude as a matter of law that parental income of over \$91,000 per year is insufficient to support a four-year-old child.

Furthermore, the trial court's decision stated that "Randall and his new wife have considerable leeway in determining the combined level of their household income." There is no evidence in the record to support this finding. The company, Franzen-Hill, is owned by Randall's in-laws, and even Melissa's counsel acknowledged this fact. Randall's wife was promoted to vice-president, but neither that position nor anything else in the record suggests unfettered freedom to set her and her husband's income.

Additionally, a trial court is not authorized to raise or lower child support because a parent has remarried and enjoys a different standard of living or lifestyle. (*Campbell, supra*, 50 Cal.App.4th at p. 854.) It is income, not lifestyle, that is a valid basis for modifying a child support order after remarriage. (*In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 331-322.) After his remarriage, Randall's income significantly declined, through no fault of his own. Yet, the trial court chose to consider Randall's "circumstances and station in life," which are generated and maintained by Amanda's income, in setting child support.

In the case of *Wood, supra*, 37 Cal.App.4th 1059, the reviewing court addressed the propriety of an order reducing the noncustodial parent's child support obligation because the custodial parent, who was unemployed, had married a wealthy spouse, and the children consequently enjoyed an affluent standard of living. The appellate court found the order to be an abuse of discretion, reasoning that "[A]lthough the trial court claimed only to take into account [the new spouse's] income as it related to [the custodial parent's] standard of living, this was tantamount to considering new mate income." (*Id.* at p. 1066.)

From the calculations and award of child support, it appears that the trial court failed to factor in Melissa's increased income and Randall's increased custodial and visitation time with Kendall when it simply continued in place the prior amount of child support. On remand, the trial court should consider these changes.

There was virtually no evidence elicited that the income of Kendall's parents was insufficient to prohibit extreme and severe hardship to Kendall. Nor was any evidence elicited that Kendall's needs presented extraordinary circumstances. Absent competent evidence on these points, it was error and an abuse of discretion to consider Amanda's income in setting child support. (*Wood, supra*, 37 Cal.App.4th at p. 1067.)

Interestingly, Randall, in the trial court, and both parties here, invited the trial court to impute a higher level of income to Randall when determining child support.

Using this approach, and upon a proper showing, the trial court can, as a practical matter, arrive at the equitable result it seeks without running afoul of the statutory scheme. The trial court might want to consider this approach on remand.

DISPOSITION

The order requiring Randall to pay child support of \$1,996 is reversed and the matter is remanded for a new hearing. Costs are awarded to Randall.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

GOMES, J.